Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Auctions of Upper Microwave Flexible Use Licenses for Next-Generation Wireless Services	)	AU Docket No. 18-85
	)	
Comment Sought on Competitive Bidding Procedures for Auctions 101 (28 GHz) and 102 (24 GHz)	)	
	)	
Bidding in Auction 101 Scheduled to Begin November 14, 2018	)	

COMMENTS OF COMPETITIVE CARRIERS ASSOCIATION

Competitive Carriers Association ("CCA")[1] submits these comments in response to the *Public Notice*[2] in the above-captioned proceeding in which the Federal Communications Commission ("FCC" or "Commission") seeks comment on separate requests by T-Mobile[3] and Sprint[4] (the "Parties") for clarification and declaratory ruling, respectively, on the Commission's certification requirement,[5] or alternatively waiver of that provision, to ensure that the Parties'

[1] CCA is the leading association for competitive wireless providers and stakeholders across the United States. CCA's membership includes nearly 100 competitive wireless providers ranging from small, rural carriers serving fewer than 5,000 subscribers to regional and national providers serving millions of customers. CCA also represents associate members consisting of small businesses, vendors, and suppliers that provide products and services throughout the mobile communications supply chain.

[2] *Wireless Telecommunications Bureau Seeks Comment on T-Mobile US Inc. and Sprint Corporation Requests for a Declaratory Ruling or Waiver of the Commission's Rules for Auctions 101 and 102*, Public Notice, AU Docket No. 18-85 (rel. Aug. 8, 2018) ("*Public Notice*").

[3] *See* Letter from Nancy J. Victory, Counsel, T-Mobile to Marlene H. Dortch, Secretary, FCC, AU Docket No. 18-85 (Aug. 6, 2018) ("T-Mobile Request").

[4] *See* Petition of Sprint Corporation for Expedited Declaratory Ruling or Waiver Regarding Joint Bidding and Request for Limited Waiver of Auction Form Rules, AU Docket No. 18-85 (filed Aug. 6, 2018) ("Sprint Petition").

[5] 47 C.F.R. § 1.2105(a)(2)(ix).

Business Combination Agreement ("BCA") will not bar their independent participation in Auctions 101 and 102.

CCA appreciates the Commission's efforts to promptly resolve any ambiguity regarding the Parties' eligibility to participate in the millimeter wave ("mmW") auctions. Potential participants in Auctions 101 and 102 are entitled to fair notice whether their pending transactions allow them to bid on the valuable mmW spectrum so critical for 5G deployment. The Commission should clarify that the BCA does not fall within the letter or the spirit of its anti-collusion rules because the BCA does not relate to the licenses being auctioned. Based on the version filed with the Security and Exchange Commission, the BCA preserves the Parties' independence to participate or not in the upcoming mmW auctions. Furthermore, it appears the BCA contains numerous safeguards to prevent any joint bidding or prohibited communications during the pendency of either or both auctions by erecting a strict firewall and imposing significant compliance responsibilities regarding communications regarding the auctions. Finally, CCA does not believe that the BCA creates any of the competitive harms that the prohibition on joint bidding arrangements is intended to prevent and clarifying that T-Mobile and/or Sprint can participate in the auction enhances the auctions' competitive landscape.

Far from averting competitive injury, an overly restrictive interpretation of the anti-collusion rules that would exclude T-Mobile and/or Sprint would jeopardize the auctions' success by reducing participation, depressing revenues to the U.S. treasury, and helping concentrate mmW spectrum into fewer industry participants. Barring T-Mobile and/or Sprint would also pose legal concerns of due process, overbreadth, and arbitrary and capricious decision-making. Properly interpreting the anti-collusion rules to allow for the Parties' involvement would comport with the law and stimulate economic benefits that come from broad

auction participation. Accordingly, the Commission should provide clear guidance that the BCA does not constituent a prohibited joint bidding agreement and therefore does not prevent participation in the auction.[6]

[6] In the alternative, the Commission should waive the anti-collusion rules as they apply to the BCA given the likelihood of public interest harms and violation of laws that would arise from barring T-Mobile or Sprint from participating in Auctions 101 and 102.

I. THE BCA DOES NOT FALL WITHIN THE SCOPE OF THE ANTI-COLLUSION RULES OR IMPLICATE HARMS THE RULES SEEK TO PREVENT

The Commission's anti-collusion rules are limited in their scope. In 2015, the Commission circumscribed the definition of "joint bidding arrangements" and excluded arrangements regarding the transfer or assignment of licenses existing at the deadline for filing short-form applications.[7] These arrangements are permissible provided that they do not both: (i) relate to the licenses at auction; and (ii) address or communicate, directly or indirectly, bidding at auction (including specific prices to be bid), or bidding strategies (including the specific licenses on which to bid or not to bid), or post-auction market structure.[8] The Commission subsequently issued similar guidance clarifying that arrangements or discussions among auction applicants or discussions between nationwide providers where at least one is an applicant that relate to post-auction market structure are permissible as long as they do not relate to the licenses being auctioned.[9]

The Commission has not changed that guidance. In its 2018 *Auctions 101/102 Public Notice*, for example, the FCC reiterated that "[a]pplicants may continue to communicate pursuant to any pre-existing agreements, arrangements, or understandings that … provide for the transfer or assignment of licenses, provided that such agreements, arrangements or understandings are

[7] *See Updating Part 1 Competitive Bidding Rules, Report and order; Order on Reconsideration of the First Report and Order; Third Order on Reconsideration of the Second Report and Order; Third Report and Order*, 30 FCC Rcd 7493 ¶¶ 182-186 (2015) ("*Part 1 Order*"); *see also* 47 C.F.R. § 1.2105(a)(2)(ix).

[8] *See* 47 C.F.R. § 1.2105(a)(2)(ix)(C); *Part 1 Order* ¶ 197 ("any agreement for the transfer or assignment of licenses existing at the deadline for filing short-form applications will not be regarded as a prohibited arrangement, provided that it does not both relate to the licenses at auction and include terms or conditions regarding a shared bidding strategy and expressly does not communicate bids or bidding strategies").

[9] *See Guidance Regarding the Prohibition of Certain Communications During the Incentive Auction, Auction 1000*, Public Notice, 30 FCC Rcd 10794 ¶¶ 33-35 (2015) ("*Auction 1000 Guidance*").

disclosed on their applications and do not both relate to the licenses at auction and address or communicate bids (including amounts), bidding strategies, or the particular permits or licenses on which to bid or the post-auction market structure."[10]

The Commission's past and current guidance makes clear that the proposed merger of the Parties as reflected in the BCA does not violate the letter or spirit of the FCC's competitive bidding rules. As T-Mobile has explained, the Parties to the merger agreement, along with their controlling parent entities, will fully comply with the prohibited-communications rules by barring discussions about bidding strategies, instituting a compliance unit to police prohibited conduct, and establishing segregated bidding committees during the pendency of the merger review process, among other measures.[11]

In addition to barring prohibited communications, Section 6.20 of the BCA notes that the Parties maintain their independence regarding auction decisions. It provides that "Sprint and T-Mobile hereby acknowledge that this Agreement is not intended to, and shall not be interpreted to, restrict the ability of either Sprint and its subsidiaries, or T-Mobile and its subsidiaries, from participating in any FCC auction that may occur after the date of this Agreement and prior to the Closing."[12] As T-Mobile has explained, the BCA is not a joint-bidding arrangement because it does not discuss or otherwise relate to the 24 GHz and 28 GHz spectrum at issue in Auctions 101

[10] *Auctions of Upper Microwave Flexible Use Licenses for Next-Generation Wireless Services; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auctions 101 (28 GHz) and 102 (24 GHz)*, Public Notice, AU Docket No. 18-85 ¶ 62 (Aug. 3, 2018) ("*Auctions 101 & 102 Public Notice*").

[11] *See* T-Mobile Request at 5.

[12] *See id*. at 4.

and 102. Underscoring T-Mobile's and Sprint's independence, the BCA appears to expressly preserves the Parties' unequivocal right to incur additional debt to participate in the auctions.[13]

Applying the plain-language of the Commission's rules in a manner that does not encompass the BCA would protect the public from anti-competitive behavior without impairing the kinds of legitimate business activity the auction rules seek to encourage.

II. A REASONABLY TAILORED APPLICATION OF THE ANTI-COLLUSION RULES WILL SERVE THE PUBLIC INTEREST BY MAXIMIZING AUCTION PARTICIPATION.

Section 309(j) directs the Commission to structure competitive bidding rules to "promot[e] economic opportunity and competition"[14] and ensure "recovery for the public of a portion of the value of the public spectrum resource made available for commercial use."[15] As CCA has maintained, achieving these goals requires broad auction participation.[16]

Interpreting the anti-collusion rules to allow the Parties' participation in Auctions 101 and 102 will maximize revenues to the U.S. Treasury by properly taking into account true demand for mmW spectrum. It also would serve as a check against speculative bids. Reduced auction participation dampens bidding amounts, which in turn creates a void that gives arbitrageurs an opportunity to acquire spectrum for resale in lieu of deployment for public benefit. Maximizing auction participation helps fulfill the core statutory and economic rationale of spectrum auctions which is to efficiently determine the bands' highest and best use, as

[13] *See id.* at 4, 6; *see also* Sprint Petition at 4-5.

[14] 47 U.S.C. § 309(j)(3)(B).

[15] *Id.* § 309(j)(3)(C).

[16] *See, e.g.*, CCA Comments, GN Docket No. 12-268 at 3 (Jan. 25, 2013) ("To create a successful auction, the Commission should do everything in its power to maximize participation"); CCA Reply Comments, GN Docket No. 12-268 at 6 (Mar. 12, 2013) ("[B]road participation coupled with an interoperability mandate will speed deployment of next-generation devices operating in the 600 MHz band to carriers and consumers across the country and maximize auction proceeds").

determined by the clearing price. That objective cannot be achieved if nationwide providers are disqualified from bidding. If key bidders cannot participate, the auction's results will reflect artificially depressed demand and generate inefficiently low auction revenues.

Allowing the Parties to bid in Auctions 101 and 102 also would promote 5G investment by ensuring a competitively neutral allocation of mmW spectrum. Excluding the Parties through the anti-collusion rules would have the perverse, anticompetitive effect of further concentrating a key input for 5G deployment and have the lasting effect of inefficiently distributing an important resource.

III. APPROPRIATELY CABINING THE ANTI-COLLUSION RULES WOULD HELP AVOID OTHER LEGAL VIOLATIONS.

Due process requires clarification from the FCC that the BCA is not a *per se* bar on auction participation. The Commission has never affirmatively stated, let alone given notice, that a pending merger of two "nationwide providers" would create a prohibited "communication" or "understanding" relating to "post-auction market structure" at an auction short-form deadline. In fact, the *Auctions 101 & 102 Public Notice* expressly declined to provide such clarification.[17] Therefore, only a previously undisclosed reading of the FCC's rules could preclude the parties to a transfer of control among "nationwide providers" from participating in the auctions. Applying such an undisclosed reading here would contravene well established safeguards of administrative and constitutional law. The FCC cannot enforce its chosen rules to the detriment of regulated entities unless those rules reflect an "ascertainabl[y] certain[]" standard of

[17] *Auctions 101 & 102 Public Notice* ¶ 41 ("We observe that some commenters have expressed views on how this prohibition might apply to specific arrangements. We emphasize here that our actions are limited to setting up generally applicable procedures for Auctions 101 and 102, and we do not address here how these might apply in the context of specific agreements or arrangements. We note that application of this prohibition requires a case-by-case determination based on the details of a specific arrangement.").

conduct.[18] A conclusion penalizing the merger of two "nationwide providers" also would effectively single out the Parties for disparate treatment without a legitimate justification. If a rule is applied in a manner that was clearly designed to (and foreseeably could only) apply to one or two entities, the FCC would undermine key due process protections by purporting to effectuate individualized adjudications under the guise of a generalized rulemaking.[19]

Administrative agencies also cannot enforce rules that are overly vague especially when such vagueness threatens communicative and expressive speech as they would here.[20] Even if the Parties may have regular conversations about merger-related issues unrelated to the auctions, they are contractually required to operationalize compliance with the FCC's joint-bidding and prohibited-communications restrictions. As mentioned above, the BCA requires the Parties' bidding teams to be firewalled from all routine merger-related work and any communication with the counterparty. There has been no basis to find that compliance is unlikely, much less that compliance is impossible.

By limiting its restrictions to those necessary to prevent anti-competitive collusion and applying them only when there is concrete evidence of a violation, the FCC can further its goal of ensuring a fair and pro-competitive auction process and remain within the bounds of its authority.[21]

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[18] *See SNR Wireless License Co., LLC v. FCC*, 868 F.3d 1021, 1043 (D.C. Cir. 2017) (citing *Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000)); *see also Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 158-159 (2012).

[19] *See, e.g., Alaska Airlines, Inc. v. CAB*, 545 F.2d 194, 200 (D.C. Cir. 1976).

[20] *See FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253-254 (2012) ("Even when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.").

[21] *See* CCA Comments, AU Docket No. 18-85 at 7 (May 9, 2018) ("[T]he FCC should clarify that its anti-collusion rules apply only to agreements that relate to the licenses at auction, and communicate, directly

IV. CONCLUSION

For the forgoing reasons, CCA urges the Commission to clarify as expeditiously as possible that the BCA does not prohibit T-Mobile and/or Sprint from participating in Auctions 101 and 102 under the anti-collusion rules. In the alternative, the Commission should waive the anti-collusion rules as they may apply to the BCA.

Respectfully submitted,

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or indirectly, bidding at auction, bidding strategies, or post-auction market structure."); *see also, e.g.*, CCA Comments, AU Docket No. 14-78 at 8 (June 9, 2014) ("[T]he Commission's anti-collusion rules have effectively guarded against collusion").